Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

Steve Haley, Petitioner

v.

State of Ohio, Respondent

On Petition For Writ Of Certiorari
To The Ohio Court of Appeals
Tenth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Why should Petitioner be deprived of his property through forfeiture without Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution that was decided in a way that conflicts with relevant decisions by the United States Supreme Court.

2. Why should Petitioner be deprived of his property through forfeiture pursuant to Ohio Revised Code 2925.42 and 2925.43 when Petitioner was never charged nor indicted for a felony drug abuse offense as mandated by the foregoing statutes nor was the seizure of Petitioner's property incident to an arrest under Section 881, Title 21, United States Code and Petitioner was the only party to hold a certificate of title pursuant to Ohio Certificate of Title found in Ohio Revised Code 4505.04.

3. Why should Petitioner be deprived of his property through forfeiture pursuant to Ohio Revised Code 2925.42 and 2925.43 is blatantly arbitrarily and capriciously enforced in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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PRAYER

The petitioner, Steve Haley, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the Franklin County Court of Appeals, Tenth Appellate District of Ohio

OPINION BELOW

The opinion of the Franklin County Court of Appeals, tenth appellate district of Ohio, issued on November 21, 1995, Case No. 95APE05-536, upholding the confiscation of the property, is not reported, and is attached as Appendix A.

JURISDICTION

The date on which the highest state court decided Petitioner's case was November 21, 1995. A copy of that decision appears at Appendix A, Ohio Court of Appeals for the Tenth Appellate District.

A timely request for discretionary review from the Ohio Supreme Court was thereafter denied on May 15, 1996, and a copy of the order denying review appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a). 28 U.S.C. §2403 (b) may be applicable to this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Constitution Of The United States
Amendment V:
"...nor be deprived of life, liberty, or property, without due process of law..."
Amendment XIV:
"...nor shall any State deprive any person of life, liberty, or property without due process of law..."

R.C. §2925.42 provides in pertinent part:

R.C. §2925.42 Forfeiture of property in connection with felony drug abuse offense or act.

* * *

(F) (3) (a) Any person other than the adult offender whose conviction or guilty plea or order of forfeiture, who asserts a legal right, title, or interest in the property that is the subject of the order may petition th ecourt that issued the order ... for a hearing to adjucicate the validity of his alleged right, title, or interest in the property [.]...

* * *

(5) (a) The Court shall amend its order of forfeiture in accordance with its determination if it determines, at the hearing, that the petitioner has established either of the following by a preponderance of the evidence:

(i) The petitioner had a legal right, title, or interest in the property that renders the order of forfeiture completely or partially invalid because it was vested in a petitioner ... or was superior to any right, title, or interest of that offender, at the time of the commission of the felony drug abuse offense ... that is the basis of the order.

R.C. §2925.43 provides impertinent part:

R.C. §2925.43 Civil forfeiture action prior to prosecution

* * *

(A) The following property is subject to forfeiture to the state ... and no person has any right, title or interest in the following property:

(1) Any property that constitutes, or is derived from, any proceeds that a person obtained directly or indirectly from the commission of an act that, upon the filing of an indictment, complaint, or information, could be prosecuted as a felony drug abuse offense [.] ...

* * *

(E) (3) The procedures specified in divisions (F) (3) to (5) of section 2925.42 of the Revise Code apply to any persons claiming any right, title, or interest in property subject to civil forfeiture under this section [.] ...

* * *

(4) ... Following the hearing, the court shall issue the requested order of civil forfeiture if the court determines that the prosecurting attorney has proven, by clear and convincing evidence that the property in question is property as described in division (A) (1) or (2) of this section[.] ...

STATEMENT OF THE CASE

This cause presents three critical issues for the future of citizens of the United States of America being deprived of property through forfeiture without having any involvement in any criminal activity; being deprived of property through forfeiture without any competent, credible evidence; and being deprived of property through forfeiture by an unconstitutional 2925.42 and 2925.43 that is blatantly arbitrarily and capriciously enforced.

This case arises from the attempt of Petitioner, Steve Haley to have his 1990 Jeep Wrangler returned to him which was forfeited to the State of Ohio pursuant to Ohio Revised Code 2925.42 (E) (4). The facts underlying this case began with the arrest or one Derrick Lipsey on May 20, 1992 who had been observed driving the 1990 Jeep Wrangler, subject of the instant forfeiture, previously, however, the Jeep Wrangler was never observed by anyone as being involved in any criminal activity whatsoever by the authorities of the State of Ohio, Respondent in the instant cause. The State of Ohio's case was based upon hearsay statements that was alleged to have been made by Derrick Lipsey.

The Petitioner appealed to the Franklin County, Ohio Court of Common Pleas from a finding by the Magistrate's Report which was overruled by the Court of Common Pleas in a Decision entered November 1, 1994, adopting the Magistrate's Report as its own.

The Franklin County, Ohio Court of Appeals for the Tenth Appellate District on November 21, 1994 rendered their Decision affirming the Trial Court's forfeiture of the Petitioner's Jeep, however, the Court of Appeals tossed out the hearsay statements attributed to Derrick Lippsey and noted: Page Two of Decision:

"The state's case was largely based upon hearsay statements attributed to Derrick Lipsey, and introduced through the testimony of Franklin County Sheriff's Department personnel."

However, the Court of Appeals stated in the same Decision page 9 of the following:

> "Based upon the foregoing enumeration of evidence, we conclude that even in the absence of the inadmissible hearsay testimony attributed to Derrick Lipsey, there was sufficient, credible evidence to establish a pattern of placing vehicles in the name of Haley's Auto Service when Lipsey was the true owner, which extended to the jeep which is the subject of this action."

The Petitioner on January 2, 1996 sought discretionary review from the Ohio Supreme Court and on May 15, 1996 the Supreme Court of Ohio declined to review the case.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARIA

The Franklin County, Ohio Court of Appeals for the Tenth Appellate District has decided an important question of federal law that has not been, but should be settled by this Court and has decided the important federal question in a way that conflicts with relevant decisions of this Court for the past seventy five years because of the following reasons:

The Court of Appeals Decision is saying that because a Derrick Lipsey was observed driving the Jeep Wrangler, subject of the forfeiture action herein and there was "sufficient, credible evidence to establish a patter of placing vehicles in the name of Haley's Auto Service when Lipsey was the true owner, which extended to the jeep which is the subject of this action," is against the manifest weight of the evidence and is one of manifest injustice.

First, the Court of Appeals tossed out any hearsay statements attributed to Derrick Lipsey and noted on page 2 of the Decision in part: "The state's case was largely based hearsay statements attributed to Derrick Lipsey, and introduced through the testimony of Franklin County Sheriff's Department personnel." The only evidence that Lipsey was the true owner was made by statements attributed to Lipsey, the Court of Appeals tossed out all hearsay statements attributed to Lipsey that left the State of Ohio without any reason to take the Jeep at issue for forfeiture except that Lipsey was observed driving the jeep but no showing was made that the Jeep was involved or used in any criminal violations or Lipsey was charged with any criminal activity that related to the time that Lipsey was observed using the Jeep. It must be further noted that the day of the arrest Mr. Lipsey was not in the Jeep but in another vehicle and it must be emphasized that under no circumstances was any illegal substance found in the Jeep, not even one marihuana cigarette.

For the past seventy five years, this Court has held that property may be subjected to forfeiture with a showing of criminal activity involving a forfeited item or the individual that has control of the item must be involved in criminal activity. See Palmyra, 12 Wheat, 1 (1827); Dobbina's Distillery v. United States, 96 U.S. 395, 401 (1878); Wrangler Oster v. Kansas, 272 U.S. 465 (1926); and Calaro Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

Petitioner was deprived of his Jeep by the Court of Appeals pursuant to Ohio Revised Code 2925.42, 2925.43 and 2933.43 which did not apply to Petitioner because Petitioner was never indicted for a felony drug abuse offense, nor was the seizure of the jeep incident to an arrest. See (1991) State v. England, 62 OMis2d 190, 594 NE2d 191 (MC).

In the instant cause there was never any evidence produced that Petitioner obtained the Jeep through the fruits of illegal drug money or any other illegal criminal activity. Evidence in this action showed that Petitioner purchased the Jeep from Whirthman Brothers several months before Lipsey was arrested and obtain title to the jeep two days after Lipsey was arrested. An individual holding a proper Ohio certificate of title is conclusively presumed to be the owner of the vehicle, and is protected against the claims of the others to
to the vehicle. See Switzer v. Carroll, 358 F 2d 424, 36 002d 232 (6th Cir.).

Petitioner not only is the innocent owner of the jeep at issue herein, but the State of Ohio failed to show that Petitioner colluded or acquiesced in criminal use of his property because the record will demonstrate that none occurred either with Petitioner or with Derrick Lipsey.

CONCLUSION

The decision below is fundamentally wrong in its reasoning and dangerous in its implications for citizens that are deprived of their property because another citizen uses the property without any criminal activity being observed against any party in the case by the State of Ohio. The Decision would establish that anyone that uses another person's property will be deprived of that property through forfeiture because of his mere use of the property without any criminal charges being made. Such an exercise of unilateral control over forfeiture to take Petitioner's property because of the mere use of that property by another who was never observed being involved in any criminal activity nor was the jeep ever involved or observed being used by any party being involved in any criminal activity, must be rejected by the United States Supreme Court.

The decision below must be reversed. A reversal will promote and preserve the unmistakable intent for the past 75 years of this Court, that forfeiture is punishment for criminal activity and the mere use of property of another is not grounds for forfeiture.

Respectfully submitted,

FRANCISCO A. GARABIS, COUNSEL OF RECORD
Date: October 11, 1996

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APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In Re: Forfeiture of 1990 Jeep Vin, 2JRFY29T3LJ541994,	:	
V.	:	No. 95APEO5-536
(Steve Haley,	:	(ACCELERATED CALENDAR)
Appellant).		

MEMORA NDUM DECISION

Rendered on November 21, 1995

Michael Miller, Prosecuting Attorney, and Matthew H. Chafin, for appellee State of Ohio.

William G. Halgas, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DESHLER, J.

Appellant, Steve Haley, appeals from a judgment of the Franklin County Court of Common Pleas ordering that the vehicle which is the subject of this action be forfeited to the state pursuant to R.C. 2925.42 (E)(~).

The facts underlying this case began with the arrest of one

No. 95APE05-536

Appellant, Steve Haley, became a party to this action by virtue of the fact that his auto repair business, Haley's Auto Service, was the title owner of the jeep. Haley's Auto Service is variously described in the record as a partnership between Steve Haley and his brother James Haley, or a business solely owned and operated by Steve Haley. Steve Haley testified at the hearing before the magistrate that the business was either a sole proprietorship or a dba. The trial court ruled that Steve Haley was the true party in interest for purposes of the forfeiture action, and this determination has not been challenged by the state.

The state's case was largely based upon hearsay statements attributed to Derrick Lipsey, and introduced through the testimony of Franklin County Sheriff's Department personnel. Lipsey had purportedly stated that for purposes of concealing his assets and avoiding forfeiture, he commonly had vehicles that he owned titled in the names of third parties. Lipsey stated that the jeep in question had been purchased by him for $1,800 or $1,900 cash from Wirthman Brothers, and titled in the name of Haley's Auto Service. Lipsey purportedly further stated that he had agreed to pay Haley's Auto Service $1,200 to repair the wrecked jeep after purchase, and, being unhappy with Haley's work, he had taken the jeep to Radical Auto Body for further repair. An employee of Radical Auto Body, Randy Hedges, testified in corroboration of this last item at the hearing. The hearsay statements of Derrick Lipsey were admitted by the magistrate pursuant to Evid.R. 801(D)(2) as an admission by a party-opponent and as a statement against interest by an unavailable declarant under Evid.R. 804(B)(3).

At the hearing before the magistrate, Steve Haley testi-

fied that he had purchased the jeep from Wirthman Brothers with money given to him by his wife. Steve Haley further stated that he had asked Lipsey to pick up the jeep from Radical Auto Body after it was repaired and store it at Lipsey's apartment complex. He further testified there was no available indoor storage at Haley's Auto Service and it was felt the neighborhood was dangerous in which to store a vehicle outside.

The magistrate's report concluded that neither Steve Haley nor Haley's Auto Service had any legitimate interest in the jeep, and only held title in the vehicle as a fiction to avoid forfeiture of assets purchased with drug proceeds

The magistrate further concluded that while Derrick Lipsey might have various defenses to forfeiture, Lipsey had chosen not to assert such defenses when he defaulted in the present action. Because appellant had no valid interest in the jeep, and could thus raise no further defense to forfeiture, the magistrate recommended that the court order the jeep forfeited to the state pursuant to R.C. 2925.43(E)(4).

Appellant filed objections to the magistrate's report which were overruled by the court in a decision entered November 1, 1994, adopting the magistrate's report as its own. Appellant has timely appealed and brings the following assignments of error:

> "1. THE TRIAL COURT ERRED IN RENDERING A DECISION AND JUDGMENT FOR THE APPELLEE WHICH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

"2. THE TRIAL COURT ERRED IN ALLOWING STATEMENT [sic] ALLEGED TO HAVE BEEN MADE BY DERRICK LIPSEY, A CONVICTED FELON, WHICH SUFFERS THE LEGAL BURDEN OF BEING FULL OF HEARSAY AND DEPRIVES THE APPELLANT OF ANY OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE AN ADVERSE WITNESS IN VIOLATION OF DUE PROCESS.

"3. THE TRIAL COURT ERRED IN ALLOWING THE REFEREE'S FINDING

THAT APPELLANT HAD NO INTEREST IN THE 1990 JEEP AND REJECTING THE FACT, WITHOUT ANY DOCUMENTARY EVIDENCE, THAT APPELLANT WAS AN 'INNOCENT OWNER' THAT HAD THE ONLY LEGAL TITLE TO THE 1990 JEEP.

"4. THE TRIAL COURT ERRED IN FINDING THAT FORFEITURE OF THE 1990 JEEP WAS PROPER IN THE ABSENCE OF ANY EVIDENCE THAT THE JEEP WAS USED IN ANY ILLEGAL DRUG TRANSACTION BY THE APPELLANT OR ABSENCE A FINDING THAT THE JEEP WAS USED BY ANYONE IN ANY LLEGAL DRUG TRANSACTION."

Appellant's first and second assignments of error will be addressed together. Initially we must examine whether the magistrate correctly allowed the state to introduce hearsay evidence in support of the proposition that Lipsey, rather than ap

pellant, was the true owner of the jeep. Two potential avenues for admissibility were recognized by the magistrate. First, Lipsey's statements to arresting officers were arguably statements by a party opponent, which do not constitute hearsay, because Lipsey was named as a party in this action. Unfortunately, this appears to mix-characterize the relative positions of Lipsey and Haley in this action. Evid.R. 801(D)(2)(a) provides in pertinent part as follows:

> "(D) Statements which are not hearsay. A statement is not hearsay if:
>
> "***
>
> "(2) Admission by party-opponent. The statement is offered against a party and is (a) his own statement, in either his individual or a representative capacity *** (.)

The Supreme Court of Ohio has stated as follows:

> "As we understand the reason underlying Evid.R. 801(D)(2)(a), that exception to the hearsay rule is limited in its scope to the admission of out-of-court statements *against the party who made them.*" (Emphasis added.) *Mastran v. Urichich* (1988), 37 Ohio St.3d 44, 47.

In the case before us, statements by Lipsey are offered by the state as admissible against appellant. The statements thus do not fall under Evid.R.

801(D)(2)(a), since they do not "satisfy the twin requirements of: (i) being offered against a party, and (ii) being that party's own statement." Mostron at 47. Lipsey's statements were accordingly not admissible under Evid.R. 801(D)(2)(a), and the court below accordingly erred in considering such hearsay evidence on that basis.

The second avenue for potential admissibility of Lipsey's statements is through Evid.R. 804(B)(3), providing as follows:

> "(B) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> "(3) *Statement against interest.* A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement."

Accepting the state's position that Lipsey's statement regarding his use of a"straw man" to hold title ownership to

his vehicles was so far contrary to Lipsey's "pecuniary or proprietary interest" as to qualify as a statement against interest for purposes of Evid.R. 804(B)(3), we must examine the necessary prerequisite for the application of this rule that the declarant be unavailable as a witness. The relevant rule of evidence is Evid.R. 804(A)(5) providing as follows:

> "(A) Definition of unavailability. 'Unavailability as a witness' includes situations in which the declarant:
>
> ***
>
> "(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means." ***

The Ohio Supreme Court has again spoken clearly on this issue: "A witness is not considered unavailable unless the prosecution has made reasonable efforts in good faith to secure his presence at trial." State v. Keeirns (1984), 9 Ohio St.3d 228, 230. (Citing Borber v. Poge (1968), 390 U.S. 719.)

The proponent of the hearsay evidence has the burden of establishing that such good faith efforts have been made to secure the witnesses attendance. Stote v. Keoirns, at 232.

A review of the record in the case before us, as well as the state's admission in its brief that Lipsey was never subpoenaed to appear at the magistrate's hearing, establishes

that the state has failed to establish a showing of unavailability as required by Evid.R. 804. Absent a showing of out of-state incarceration or similar impediment to producing a witness for trial, mere assertion that a witness is currently imprisoned, without more, does not establish the witness' unavailability. We therefore find that the court below erred in admitting Lipsey's statements pursuant to Evid.R. 804(B)(3). See Stote v. Rolph Dooley (Aug. 31, 1995), Mahoning App. No. 93-24, unreported.

We will thus address the manifest weight arguments raised by appellant's first assignment of error, by examining the evidence in the record without consideration of the inadmissible hearsay testimony of Derrick Lipsey. A reviewing court will not reverse a judgment based upon the manifest weight of the evidence if the judgment is supported by some competent, credible evidence. C.E. Morris Co. v. Foley Const. Co. (1978), 54 Ohio St.2d 279. The weight and credibility to be given to the testimony of witnesses is a matter for the trier of fact. State v. DeHass (1967), 10 Ohio St.2d 230.

Once the hearsay statements of Derrick Lipsey are excluded, the following evidence remains regarding the ownership of the jeep. Kathleen Barch, an employee of the Ohio Bureau of Criminal Identification & Investigation, stated that pursuant to her investigation of Derrick Lipsey, she obtained statements from Steve Haley that he had purchased the jeep from Wirthman Brothers, who had retained the title for some time because Haley had failed to pay sales taxes on the transaction.] Steve Haley further told Barch that Lipsey had taken the jeep for an extended test drive and had failed to return it. At the same time he purchased the jeep,

Haley had purchased a Honda automobile with Derrick Lipsey's money, which also was put in the name of Haley's Auto Service. Although Barch's testimony is somewhat unclear on this point, it appears that another vehicle, a 1987 Ford van, was purchased by Haley's Auto Service for Derrick Lipsey. On cross-examination, counsel for appellant established that the above van was placed in the name of James L. naley, Steve's brother, rather than Haley s Auto Service.

Detective Mychal Turner, of the Franklin County Sheriff's Department, testified that he had observed Derrick Lipsey pick up the jeep from a business on Refugee Road, and transfer tags from another vehicle onto the jeep, which he then drove to various locations over the next few days, frequently alternating the tags between the jeep and his other vehicles.

Sergeant Michael Powell of the Franklin County Sheriff's Department testified that he had been present at a conversation between Kathleen Barch and Steve Haley, and that Haley had stated that he owned the jeep, and that Lipsey had been using it. Haley further stated at that time that Lipsey had offered to pay the Haley brothers $sSnon if he could manage the books of Haley's Auto Service as a silent partner, in order to launder money through the business. Haley stated that he had declined the offer.

Based upon the foregoing it appears that the state established a pattern of "straw man" ownership by Haley Auto Service of vehicles actually owned by Derrick Lipsey, although specific statements by Steve Haley as to the jeep itself were lacking. The state also established some contradiction between Steve Haley's earlier statement that he had given the jeep to Lipsey for an extended test drive, and his statements at the hearing that he had asked Lipsey to

tore the jeep because it would have been unsafe to store it outside of Haley's Auto Service. Further contradictory testimony was elicited from Steve Haley at the hearing when he stated that he had purchased the Honda with his wife's money and sold it to another mechanic when he was unable to repair an electrical problem.

The testimony of Randy Hedges, an employee of Radical Auto Body, was that he identified a picture of Lipsey as being one "Mr. Haans" who had brought a jeep, matching the description of the one at issue, into Radical Auto Body on Refugee Road for some frame work. "Mr. Haans" paid $440 cash for the repairs.

Based upon the foregoing enumeration of evidence, we conclude that even in the absence of the inadmissible hearsay testimony attributed to Derrick Lipsey, there was sufficient, credible evidence to establish a pattern of placing vehicles in the name of Haley's Auto Service when Lipsey was the true owner, which extended to the jeep which is the subject of this action. With due deference to the trial court's determination of the credibility of witnesses, and in particular the credibility of Steve Haley, we find that the determination by the Franklin County Court of Common Pleas as to ownership of the vehicle was not erroneous. In accordance with the foregoing, while we find that the court erred in admitting the hearsay testimony at issue in appellant's second assignment of error, such error was not prejudicial as the manifest weight of the remaining evidence supported the court's judgment. Appellant's first and second assignments of error are accordingly overruled.

Appellant's third and fourth assignments of error are predicated on a premise which has not been demonstrated in

this case, that is, that appellant was the true owner of the jeep at issue. Appellant's third and fourth assignments of error, therefore, need not be addressed in the context of our determination with respect to ownership in this case.

Based upon the foregoing, appellant's assignments of error are overruled. The judgment of the Franklin County Court of Common Pleas is therefore affirmed.

Judgment affirmed.

CLOSE and HOLMES, JJ., concur.

HOLMES, J., retired of the Supreme Court of Ohio, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX B

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In Re: Forfeiture of 1990 Jeep Vin, 2JRFY29T3LJ541994,	:	
V.	:	No. 95APEO5-536
(Steve Haley,	:	(ACCLERATED CALENDAR)
Appellant).		

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the memorandum decision of this court rendered herein on November 21, 1995, appellant's assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

CLOSE, DESHLER & HOLMES, JJ.

By "S/ Judge Dana A. Deshler".

HOLMES, J., retired of the Supreme Court of Ohio, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

cc: Michael Miller, PA
Matthew H. Chafin, APA
Carol Hamilton-O'Brien

APPENDIX C

IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO

STATE OF OHIO,
PETITIONER,

vs .

STEVE HALEY
FORFEITURE OF 1990 JEEP
2J4FY29T3LJ541994

RESPONDENT.
CASE NO. 92CVH06-4677

JUDGE DEBORAH P. O'NEILL

DECISION AND ENTRY OVERRULING MAY 3, 1993 OBJECTIONS TO REFEREE'S APRIL 20, 1993 NOTICE OF ADDITIONAL HEARING; ADOPTING REFEREE'S REPORT FILED JUNE 21, 1993 OVERRULING OBJECTIONS TO REFEREE'S REPORT FILED JUNE 30, 1993; ORDER TO CLERK OF COURTS

Rendered this 26th day of October, 1994.

O'Neill, D., J.

Before the Court are the following:

1. Respondent's Objections to the Referee's April 20, 1993

Notice of Additional Hearing, filed May 3, 1993.

2. The Referee Report of Rita Bash Eaton, filed June 21, 1993.

3. Respondent's Objections to the Referee Report of Rita Bash Eaton, filed June 30, 1993.

May 3, 1993 Objections to Additional Hearing

Respondent objects to the Referee's granting of an additional hearing to reopen the case for the testimony of James Haley. Civ. R. 53(C) provides in pertinent part: "the referee shall exercise the power to regulate all proceedings in every hearing before the referee as if by the court and to do all acts and take all measures necessary or proper for the efficient performance of the referee's duties under the order."

It does not appear that Respondent has been prejudiced by the allowance of this additional hearing. Thus, Respondent's May 3, 1993 Objections are OVERRULED.

June 30, 1993 Objections to Referee's Report

Referee Eaton issued her report filed June 21, 1993, after hearing evidence on whether the Jeep in question may be forfeited to the State pursuant to R.C. 2925.43, and whether Respondent Haley's Auto Service can assert a legitimate ownership interest in said Jeep by a preponderance of evidence.

Respondent Steven Haley filed his Objections to the Referee's Report on June 30, 1993. Petitioner filed a Response to the Respondent's Objections on July 15, 1993. Respondent

filed a Motion for Leave to File Transcript on July 19, 1993. Respondent brought this Motion to this Court's attention in the winter of 1994. This Court granted Respondent's Motion for Leave to File Transcript on February 25, 1994. On March 18, 1994, Respondent filed its Memorandum and Transcript Citations in Support of Objections to Referee's Report. In summer, 1994, this Court discovered that this case was still assigned to Judge Cain. On August 12, 1994, this case was transferred to this Court's docket, as Judge O'Neill assumed Judge Cain's caseload consequent to her election to the bench in November of 1992.

Civ. R. 53(E)(2) states that, upon filing of Objections to a Referee's Report, the Court may "* * * adopt, reject or modify the

report, hear additional evidence; return the report to the referee with instructions; or hear the matter itself."

Civ. R. 53(E)(6) provides in pertinent part:

The Court may adopt any finding of fact in the Referee's Report without further consideration unless the party who objects to that finding supports that objection with a copy of all relevant portions of the transcript from the Referee's hearing or an affidavit about evidence submitted to the Referee if no transcript is available. In deciding whether or not to adopt a Referee's Finding of Fact, the Court may disregard any evidence that was not submitted to the Referee unless the complaining party demonstrates that with reasonable diligence he or she could not have discovered and produced that evidence for the Referee's consideration.

In ruling on objections to a Referee's Report, "the trial court must undertake the equivalent of a de novo determination in light of any filed objections, when independently assessing the facts and conclusions obtained in the report of a Referee." DeSantis v. Soller (Franklin, 1990), 70 Ohio App.3d 226, 232. In conducting this independent assessment, "[t]he trial court should not adopt challenged Referee's findings of fact unless the trial court fully agrees with them - that is, the trial court, in weighing the evidence itself and fully substituting the Judgment of that of the Referee, independently reaches the same factual conclusions." DeSantis, supra, at 233. Furthermore, "[a] trial court is not precluded from making a factual finding which the Referee has failed to make. Rather, the trial court has the discretion to remand to the Referee or to make the determination itself, either upon the evidence in the transcript or adduced at a new hearing before the court." Id.

It has been held that a transcript must be filed to enable a trial court to conduct this de novo review. See e.g., Zacek v. Zacek (Franklin, 1983), 11 Ohio App.3d 91, paragraph one of the syllabus.

The Respondent has stated several objections to the referee's report. First, Respondent objects to the admission of alleged hearsay statements made by Derrick Lipsey. Respondent objects to the

admission of these statements as Respondent had no opportunity to cross examine Mr. Lipsey. Further, Respondent contends that "Mr. Lipsey is a convicted felon and Respondent had no opportunity to challenge the credibility of Mr. Lipsey." Second, Respondent objects to the Referee's conclusion that

Respondent had no interest in the Jeep. Respondent contends that he is an "innocent owner of the Jeep and protests that a recent U.S. Supreme Court case, United States v. 92 Buena Vista Ave., Rumson, NJ (1993), 113 S.Ct 1126, 122 L.Ed.2d 469, was not cited by the Referee or the State. Third, Respondent impliedly objects to the Referee's conclusion that forfeiture was proper, and contends that there is an absence of evidence that the Jeep was used in any illegal drug operation by either Respondent or Mr. Lipsey. Each of these objections will he discussed in turn below.

First Objection

The Ohio Rules of Evidence address the issue of when hearsay testimony will be admitted.
Evid.R. 804 provides in pertinent part:

Evid.R. 804. Hearsay exceptions; declarant unavailable

(A) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

* * *

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance....

* * *

(B) Hearsay exceptions The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(3) Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest ... that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true.

Due to his incarceration, Derrick Lipsey was unavailable as a witness pursuant to Evid.R. 804. However, to meet the hearsay exception, the statement must also fall within one of the hearsay exceptions listed under Evid.R. 804(B). State v. Williams (1988), 38 Ohio St.3d 346, 348, 528 N.E.2d 910, 914-915. The statements attributed to Mr. Lipsey were made at the time of his arrest. The statements that he would purchase vehicles and put them in other persons' names and avoid the transfer of titles in his name was contrary to his interest at the time. Such statements fall within the hearsay exceptions of Evid.R. 804(b)(3). Therefore, this Court ADOPTS the conclusion of the Referee and OVERRULES Respondent's objection grounded upon hearsay.

Second Objection

The Ohio Revised Code S2925.42 provides protection from forfeiture for innocent owners of property which is subjected to forfeiture.

R.C. S2925.42 provides in pertinent part:

R.C. S2925.42 Forfeiture of property in connection with felony drug abuse offense or act.

(F)(3)(a) Any person other than the adult offender whose conviction or guilty plea or ... whose adjudication is the basis of the order of forfeiture, who asserts a legal right, title, or interest in the property that is the subject of the order may petition the court that issued the order ... for a hearing to adjudicate the validity of his alleged right, title, or interest in the property [.]...

* * *

(5)(a) The Court shall amend its order of forfeiture in accordance with its determination if it determines, at the hearing, that the petitioner has established either of the following by a preponderance of the evidence:

(i) The petitioner had a legal right, title, or interest in the property that renders the order of forfeiture completely or partially invalid because it was vested in a petitioner ... or was superior to any right, title, or interest of that offender, at the time of the commission of the felony drug abuse offense ... that is the basis of the order.

Respondent contends that he is an "innocent owner" of the Jeep and that since he has title to the Jeep, he is exclusively presumed to be the owner of the vehicle and is protected against the claims of all others. However, R.C. S 2925.42(F)(3)(a) states that at a hearing, the person claiming interest in the property will be judged on whether such interest is valid. Thus, if the claimed interest is not valid (fraudulent in an attempt to prevent the forfeiture), then the claim will not stand.

Considering the admission that Mr. Lipsey purchases cars and puts them in others' names, that the Jeep was purchased in November of 1991 and the title was not transferred into Respondent's name until the following May, that Respondent told contradicting stories to various parties, and that Lipsey had asked Respondent if he could manage his books as a silent partner to run some money through the business, there is evidence that Respondent's interest is not valid. These facts from the transcript demonstrate that Respondent and Mr. Lipsey could well have been involved in a scheme to avoid forfeitures of vehicles purchased with proceeds from Mr. Lipsey's felony drug abuse offense. Pursuant to R.C. S2925.42' the Referee concluded that Respondent does not have a valid legitimate interest in the Jeep. -

While the Respondent protests that neither the State or the Referee addressed the case of United States v. 92 Buena Vista Ave., Rumson, NJ (1993), 113 S.Ct 1126, 122 L.Ed.2d 469, it does not appear that this omission was error. Respondent himself did not present a complete citation for this case. The case of United States v. 92 Buena Vista Ave., Rumson, NJ, concerns the interpretation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which is not the same statute under which the instant Jeep was seized. Respondent urges that

this Court must follow that cases' ruling which the Respondent summarizes is that "the government can't take property from innocent people even if it once had a connection to illegal drugs." However, Respondent has not demonstrated that he is an innocent owner of the Jeep in question.

Upon review of the memoranda, the law, the transcript, and other evidence presented, this Court does not find Respondent's objection to be well-taken and ADOPTS the conclusion of the Referee that Respondent does not have a valid legitimate interest in the Jeep.

Third Objection

Respondent's third objection is that the forfeiture of the Jeep was improper in the absence of any evidence that the Jeep was used in any illegal drug transaction by either Mr. Lipsey or Respondent. The Ohio Revised Code S2925.43 explains the standard for a proper civil forfeiture.

R.C. S2925.43 provides in pertinent part:

R.C. S2925.43 Civil forfeiture action prior to prosecution

* * *

(A) The following property is subject to forfeiture to the state ... and no person has any right, title or interest in the following property:

(1) Any property that constitutes, or is derived from, any proceeds that a person obtained directly or indirectly from the commission of an act that, upon the filing of an indictment, complaint, or information, could be prosecuted as a felony drug abuse offense[.] . ..

* * *

(E)(3) The procedures specified in divisions (F)(3) to (5) of section 2925.42 of the Revised Code apply to any persons claiming any right, title, or interest in property subject to civil forfeiture under this section[.] ...

* * *

(4) ... Following the hearing, the court shall issue the requested order of civil forfeiture if the court determines that the prosecuting attorney has proven, by clear and convincing evidence that the property in question is property as described in division (A)(1) or (2) of this section[.]...

The Petition for Forfeiture in Respondent's case was brought by the State pursuant to R.C. S2925.43. The Referee ordered the forfeiture pursuant to division (E)(4) of that section. Respondent objects based on the fact that there is no evidence that the Jeep was ever used in the commission of a felony drug abuse

offense. The Referee conceded that point. However, Respondent fails to address the fact that property need not be used in the commission of the illegal act to be subject to forfeiture. R.C. S2925.43 (A)(1) also states that property that is derived, either directly or indirectly, from the proceeds obtained from a felony drug abuse offense, is also subject to forfeiture. Therefore, if there is evidence that the Jeep was purchased by Mr. Lipsey, and if there is evidence that the property in question was derived, directly or indirectly from the proceeds obtained from a felony drug abuse offense, then the standards for forfeiture pursuant to R.C. 2925.43 will be satisfied.

In the instant case, the interest of Lipsey was forfeited by default entry filed on November 27, 1992.

The State presented evidence that Lipsey drove the Jeep for about ten days prior to Lipsey's arrest. Lipsey stated that he had purchased the Jeep from Workman's Auto for $1800 to $1900 seven months before his arrest. Lipsey said that Haley's Auto Shop had performed $1200 of work on the Jeep for him. Lipsey admitted that he would purchase vehicles and put them in other people's names. Respondent's signature was on the sales document for the Jeep. The document was dated 11-16-91 and the price was listed at $19 00. Respondent stated that he purchased a Honda for Derrick Lipsey, with Derrick Lipsey's money. Moreover, Respondent purchased a Honda at the same time the Jeep was purchased.

Mr. Lipsey was convicted for a felony drug abuse offense. Witness detective Michael Turner testified that he saw Lipsey driving the Jeep on a number of occasions, and confirmed that it was one of Lipsey's main forms of transportation. Lipsey was arrested on federal charges of conspiracy to distribute narcot

ics and plead guilty to those charges. Respondent told witness Michael Powell that Lipsey had offered to pay $5,000 to Respondent if he could manage Haley's Auto Shop's books to runs some money through the business. Respondent decided not to accept Lipsey's offer. Of the vehicles driven by Lipsey, only the pickup truck was titled to him.

Based upon this and other circumstantial evidence presented to the Referee, this Court OVERRULES the remaining objection of the Respondent and ADOPTS the Referee's recommendation that this automobile be forfeited to the State pursuant to R.C. 2925.43(E)(4).

Thus, the Objections of the Respondent are OVERRULED and this Court ADOPTS the June 18, 1993 Report of the Referee.

The State is requested to submit a final judgment entry in accordance with Loc. R. 25.01 to this Court.

ORDER TO CLERK OF COURTS

The Clerk of Courts is requested to record these decisions and to remove Respondent's May 3, 1993 and June 30, 1993 objections from the motions docket per decisions rendered.

IT IS SO ORDERED.

DEBORAH P. O'NEILL, JUDGE

Copies to:

Carol Hamilton O'Brien, Esq.
Assistant Prosecuting Attorney
Attorney for Petitioner
William G. Halgas, Esq.
Attorney for Respondent

APPENDIX D

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY OHIO

IN RE: FORFEITURE OF 1990]
JEEP.

CASE NO. 92CVH06:4677 JUDGE 0.NEILL

REFEREE'S REPORT
Rendered this 18th day of June 1993

TO: THE HONORABLE DEBORAH P O'NEILL, JUDGE
FRANKLIN COUNTY COURT OF COMMON PLEAS

This case was before the Referee on the State's Petition for Forfeiture brought pursuant to ORC 2925.43. It involves a 1990 Jeep Wrangler owned by Haley's Auto Service. The State notified Maloy's Auto Service and Dorrick Lipecy of the forfeiture. Lipsey is in the federal penitentiary on a conspiracy to distribute cocaine conviction. Presumably he was served because he had been obeerved by the police driving this vehicle about two weeks before his arrest on May 20, 1992. There was no evidence presented, however, that he ever transported drugs in the Jeep. He has not asserted his interest in the vehicle. That interest was forfeited by default entry entered by this Court on November 27, 1992.
The State brought the action under ORC 2925.43(A)(1):

H (A) The following property is subject to forfeiture to the state in a civil action as described in division (E) of this section, and no person has any right, title, or interest in the following property:

(1) Any property that constitutes, or is derived directly or indirectly from, any proceeds that a person obtained directly or indirectly from the commission of an act that upon the filing of an indictment, complaint, or information, could be prosecuted indirectly from the commission of an act that, upon the filing of as a felony drug abuse offense . . ."

Derrick Lipsey did not participate in the trial as either a party or a witness. His conviction was for a felony drug abuse offense. Lipsey was observed by the police driving the Jeep on May 14, 1992. He took it to Radico for repairs and used a name other than his own to have it repaired. He paid cash for the repairs on May 12, 1992. When he was arrested he told the police that he had purchased the Jeep seven months prior for $1800 and that he had paid Haley's $1200 to repair it. He stated that the title was "up north." He stated that he would buy vehicles and put them in other peoples' names. He told Randy Hedges from Radico that he was unhappy with the work done at Haley' s. This testimony was admitted pursuant to Evidence Rule 801(D)(2) because Lipsey is a party to this lawsuit although he did not contest the action and/or 804(3). The declarant is unavailable for a civil trial because of his incarceration. This is a statement against his pecuniary or proprietary interest.

When Steven Haley was interviewed by the police, he corroborated Lipsey's story that he had purchased the Jeep, among other vehicles, for Lipsey with Lipsey's money and put them in Haley's Auto Service's name. Steven Haley also told the police that Lipsey took the Jeep for a test drive and never returned it. He claimed he was going to file a stolen report with the police. The purchase of the Jeep and a Honda from Wirthman Brothers occurred on November 20, 1991 which concurs with Lipsey's statement that he had purchased it about seven months prior to his arrest (May 20, 1992). The title was not actually transferred until May because the taxes were not paid. The documentary evidence submitted by the State seems to bear out that evidence offered by Steve Haley. Haley also told the police that Lipsey wanted to "run the money" through the Haley Auto Service business and Haley declined.

During the course of the trial, there were several procedural problems. Steven Haley filed an Anewer in his own behalf rather than on behalf of the title owner of the vehicle, Haley's Auto Service. The Referee allowed the Respondent to assert his interest in the vehicle on behalf of both Haley's Auto Service and himself since it appeared that he actually had no personal interest although he testified that he purchased the vehicle with his wife's money. This was over the objection of the State. Also the State attempted to put in evidence of what James Haley told the police since they had subpoenaed him and he had failed to appear. The issue there was whether or not James Haley was an agent of Maley's Auto Service. Both were interviewed at that location although Steven Haley denied that

they run the bw inese together and states that James had his own business. The Referee allowed the State to reopen its case to bring James Haley in by enforcement of the subpoena; however, it was learned on the day of the last hearing that been served with his subpoena. That information was unavailable on the first date because the clerk's office computer was down. James Haley never testified.

> Although it is the belief of this Referee that both Steven Haley and James Haley operate Haley's Auto Service, the statements attributed to James Haley were not considered in reaching these conclusions because they were not reliable under the circumstances.
>
> When Steven Haley took the witness stand he completely denied ever telling the police about purchasing the Jeep for Lipsey and about Lipsey not returning it and stated that his wife had given him the money to purchase the vehicles out of some sort of settlement and that he had bought them as an investment. He claims Lipesy's only connection to the vehicle was that it was parked at his apartment complex because there was no room at the shop and that he asked him toopick it up at Radico. On May 20, 1992, the Jeep was seized at Lipsey's girlfriend's apartment complex. The drugs had been seized and Lipsey arrested in a 1987 Ford van. The van had also The van had also been purchased by Haley for Lipsey according to Haley's admission to the police.

Based on the foregoing facts adduced at the hearinq, it is the conclusion of this Referee that neither Steven Haley nor Maley's Auto Service have any legitimate interest in this vehicle. Steven Haley's testimony in court was totally incredible given what he and Lipsey both told the police at the time of the arrest of Lipsey. The ownership of the Jeep by Haley's auto service is nothing more than a fiction created by Steven Haley and Derrick Lipsey, presumably to avoid forfeiture of automobiles purchased with drug proceeds. The Jeep was purchased with Lipsey's money, Lipsey took it to Haley's and Radico for repair and gave a false name when an estimate was done. The Jeep remained in the custody of Lipsey. It was not until after Lipsey's arrest that the title was finally put into the name of Haley's Auto Service.

Lipsey may well have had defenses to the forfeiture pursuant to the method in which it was seized and its relationship to drugs; however, he chose not to assert those. Also, in this action, it was not necessary for the State to prove those connections or the legality of the seizure since the only issue before the court is whether or not Haley or Haley's Auto Service had any valid interest in the vehicle. Respondent in this case carries the burden of proving that he has a valid interest in the vehicle. ORC 2925.43(E)(3) and ORC 2925.42(F)(3)-(5). Respondent has failed in this burden based on his own lack of credibility.

Since there is no valid interest in the Jeep other than that of its true owner, Derrick Lipsey, which has been forfeited by default, the Court should deny Respondent's assertion of interest and Order this automobile forfeited to

the state pursuant to ORC 2925.43(E)(4)

The exhibits have been returned to Tom Chaney, Court Reporter.

RITA BASH EATON, REFEREE

Appearances:

CAROL O'BRIEN, ACP
Counsel for Petitioner

WILLIAM G. HALGAS, Esq.
Counsel for Respondent

APPENDIX E

FILED
May 15 1996

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

The Supreme Court of Ohio

		1996 TERM
In re: Forfeiture of 1990 96-5 Jeep, VIN 2j4FY29T3LJ541994, (Steve Haley).	:	Case No.
	:	ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40,00, paid by William G. Halgas, Esq.

(Franklin County Court of Appeals; No. 95APE05536)

"S/ Thomas J. Moyer".
Cheif Justice